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In the

Supreme Court of the United States

OCTOBER TERM, 1993

QUILL CORPORATION,
Petitioner,

v.

STATE OF NORTH DAKOTA,
BY AND THROUGH ITS COMMISSIONER,
ROBERT E. HANSON,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

BRIEF OF AMICUS CURIAE DIRECT MARKETING ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

GEORGE S. ISAACSON
Counsel of Record
MARTIN I. EISENSTEIN
DAVID W. BERTONI
BRANN & ISAACSON
184 Main Street
P.O. Box 3070
Lewiston, Maine 04243-3070
(207) 786-3566

ROBERT J. LEVERING
Senior Vice President
DIRECT MARKETING ASSOCIATION
Washington, D.C. 20543
Attorneys for Amicus Curiae
Direct Marketing Association

BATEMAN & SLADE, INC. BOSTON

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STATEMENT OF INTEREST

The Direct Marketing Association ("DMA"), pursuant to Supreme Court Rule 37.2, submits this brief as *amicus curiae* in support of the Petition for Certiorari filed by Quill Corporation ("Quill"). DMA has obtained the written consent of both parties to this case.

DMA, a not-for-profit corporation, is the oldest and largest trade association representing companies which are involved in direct-to-the-consumer mail advertising and marketing. DMA's membership exceeds 3200 firms located in all 50 states and 40 foreign countries. The majority of DMA's members are smaller companies. Approximately 85% have annual sales of $10 million or less. Approximately 20% employ fewer than 4 people, including "mom and pop" operations that continue to prepare their catalogs on kitchen tables. Most of DMA's members sell exclusively by means of interstate commerce — sending catalogs and other advertising materials by the United States Mail, receiving orders by mail or telephone, and delivering goods by interstate common carriers.

DMA members, large and small, have relied upon a long line of United States Supreme Court cases, including *National Bellas Hess, Inc.* v. *Department of Revenue*, 386 U.S. 753 (1967), and, more recently, *Quill Corp.* v. *North Dakota*, 112 S.Ct. 1904 (1992) ("*Quill I*"), to protect them from being forced to collect use taxes by states in which they have no physical presence (or "nexus"). These cases establish that such use tax collection demands violate the rights of DMA's members under the Commerce Clause to the United States Constitution. However, despite this clear precedent, DMA members that lack nexus nonetheless continue to be targets of aggressive campaigns by state tax officials to compel them to collect and remit use taxes. These demands are often based upon far-fetched theories of nexus which are at odds with both the *National Bellas Hess* and *Quill I* cases.

Yet, in a practical sense, most DMA members are effectively foreclosed from defending their constitutional rights if they are denied the opportunity, under 42 U.S.C. § 1988, to recover reasonable attorney's fees and expenses. Of equal importance, if states can avoid exposure to attorney's fees under § 1988, no matter how egregious their unconstitutional acts may be,

there will be no meaningful deterrent to their bold, intimidating, and costly demands.[1] Because DMA's members, as nonresidents, make politically appealing targets for tax assessments, the need for the deterrent effect of attorney's fees awards is especially critical.

DMA, therefore, supports Quill's request for certiorari. Indeed, DMA believes that summary reversal would be appropriate.[2] Allowing the North Dakota decision to stand — in conflict with clear United States Supreme Court precedent — would also be a staggering blow to DMA's membership. It would also result in totally inconsistent state court opinions persisting on this critical issue. The gravity of the situation facing DMA's members is underscored by the fact that there are still over 30 states with sales and use tax statutes on their books which are flatly unconstitutional under the *National Bellas Hess* and *Quill I* nexus standard. Revenue officers in

[1] The methods by which states attempt to force mail order companies to collect use taxes are especially unseemly. Use taxes are owed, in the first instance, by in-state residents who purchase goods from out-of-state retailers. However, nonresident mail order companies are frequently threatened with direct liability for those taxes if they refuse to collect them for the state. State revenue departments approach mail order companies and demand that they commence collection of use taxes under the threat of an assessment for previous uncollected taxes. The cost of refusing such demands could be staggering since, in most states, no statute of limitations applies and use tax assessments frequently cover periods of six years or more. *See Quill I*, 112 S.Ct. at 1916 n.10. Confronted with an assessment, the mail order company, in order to gain access to state court, usually first must pay the assessment, plus interest and penalties. By the same token, the costs of caving in to state tax collection demands are extraordinary as well. *See Quill I*, 112 S.Ct. at 1913 n.6. The untenable position of DMA's members is made still worse by numerous interstate compacts which often result in coordinated, multi-state use tax collection demands and assessments.

[2] Although uncommon, summary reversal is appropriate in "situations in which the law is well settled and stable, the facts are not in dispute, and the decision below is clearly in error." *Schweiker* v. *Hansen*, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting). As discussed herein, the decision below plainly misconstrued the Court's precedent in *Howlett* v. *Rose*, 496 U.S. 356 (1990), which established that state courts are obligated to hear properly presented claims under § 1983.

those states frequently argue — even after the Court's decision in *Quill I* — that they are bound to enforce those statutes until they are repealed by their state's legislature or invalidated by a court of law. As a result, DMA members face the specter of costly state-by-state battles to rid state tax codes of such unconstitutional provisions — a war which only the largest mail order companies can afford.

If the mail order industry is to continue providing the opportunity for start-up entrepreneurs and small businesses to gain access to a national marketplace, those retailers must have some protection from the withering effect of unconstitutional use tax collection demands. DMA submits that § 1988 was intended to make such protection available through the courts to all litigants, including those of modest means. The decision of the Supreme Court of North Dakota, however, places such protection beyond the reach of most DMA members.

REASONS FOR GRANTING THE WRIT

I. IMPORTANT QUESTIONS OF FEDERALISM ARE RAISED BY NORTH DAKOTA'S REFUSAL TO PERMIT ENFORCEMENT OF 42 U.S.C. § 1983 IN STATE COURT.

The court below improperly discriminated between state and federal claims: it adjudicated Quill's claim for declaratory relief under a state declaratory judgment statute, but refused to allow a claim for declaratory relief and attorney's fees under 42 U.S.C. §§ 1983 and 1988 (1988). The Supremacy Clause forbids such discrimination. U.S. Const., Art. VI, cl. 2. It is important for this Court to make clear to the many state courts which already have considered this issue — or will in the future

— that they cannot "dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superiority of its source." *Howlett* v. *Rose*, 496 U.S. 356, 371 (1990).

Indeed, DMA believes that summary reversal would be appropriate here. The law in this area is well-settled. In *Howlett*, this Court resolved a persistent conflict concerning whether states were required to hear claims under 42 U.S.C. § 1983. In ruling that they must hear such claims, the Court explained that "[t]he Supremacy Clause makes [the Constitution and the laws passed pursuant to it] 'the supreme Law of the land,' and charges state courts with a coordinate responsibility to enforce that law according to their regular modes of procedure." *Howlett*, 496 U.S. at 367. Thus, the Court in *Howlett* invalidated a Florida rule of law which conferred immunity on state government entities from federal civil rights actions, holding that "the Florida court's refusal to entertain one discrete category of § 1983 claims, when the court entertains similar state-law actions against state defendants, violates the Supremacy Clause." *Id.* at 375. A routine application of *Howlett* v. *Rose* invalidates the decision below.[3]

A. *A State Court Cannot Decline Jurisdiction Over Federal Claims If the Parties Are Properly Before It and It Has Authority To Grant the Requested Relief.*

"[W]here the same type of claim, if arising under state law, would be enforced in state courts, the courts are not generally free to refuse enforcement of the federal claim." *Martinez* v. *California*, 444 U.S. 277, 284 n.7 (1980). The suggestion that

[3] It should be noted that this Court declined to grant certiorari in the recent case of *Huddleston* v. *Bloomingdale's By Mail Ltd.*, 848 S.W.2d 53 (Tenn. 1992), *cert. denied*, ___ S.Ct. ___, 66 U.S.L.W. 3850 (June 21, 1993). In *Bloomingdale's*, the Supreme Court of Tennessee held that adjudication of § 1983 cases in state court tax cases was mandatory, a conclusion which is in stark contrast to the decision below.

state courts may discriminatorily refuse jurisdiction over federal claims — including those arising under 42 U.S.C. § 1983 — is "quite inadmissible." *Testa* v. *Katt*, 330 U.S. 386, 392 (1947) (quoting *Mondou* v. *N.H. and H.R. Co.*, 223 U.S. 1, 57 (1912)). *See also Howlett* v. *Rose*, 496 U.S. at 378-79 (1990) (where a state court has general jurisdiction over state actors and has authority to provide the remedies which are sought, adjudication of claims under 42 U.S.C. § 1983 is mandatory).

In this case, North Dakota's failure to recognize the superior authority of federal law is inexcusable. State courts cannot decline jurisdiction over a federal claim unless that dismissal results from the invocation of a neutral rule which applies to state and federal claims alike. As the Court observed in *Howlett* v. *Rose*:

> [o]n only three occasions have we found a valid excuse for a state's refusal to entertain a federal cause of action. Each of them involved a neutral rule of judicial administration. In *Douglas* v. *New York, N.H. and H.R. Co.*, the state statute permitted discretionary dismissal of both state and federal claims where neither the plaintiff nor the defendant was a resident of the forum state. In *Herb* [v. *Pitcairn*], the city denied jurisdiction over a FELA action on the grounds that the cause of action arose outside of its territorial jurisdiction. Although the state court was not free to dismiss the federal claim 'because it is a federal one,' we found no evidence that the state court 'construed the state jurisdiction and venue laws in a discriminatory fashion.' Finally, in [*Southern Ry. Co.* v.] *Mayfield*, we held that a state court could apply the doctrine of *forum non conveniens* to bar adjudiciation of a FELA case if the state 'enforces its

> policy impartially so as not to discriminate against Employers' Liability Act suits.'

496 U.S. at 374 (citations omitted).

Unlike the three cases identified by the Court in *Howlett*, the Supreme Court of North Dakota's refusal to allow a federal claim was not "neutral" in any sense of the word. Indeed, the court made no pretense of neutrality: "We do not read *Howlett* and earlier Supreme Court cases to require state courts to entertain § 1983 actions . . ." Appendix ("App.") at 12. This is precisely the kind of discriminatory practice which this Court has consistently condemned as contrary to the requirements of the Supremacy Clause. *See, e.g., Martinez* v. *California*, 444 U.S. 277, 284 n.7 (1980). A state court which has jurisdiction over "state common law or statutory law" claims, but "declines jurisdiction over federal actions for constitutional violations by the same persons . . . flatly violates the Supremacy Clause." *Howlett* v. *Rose*, *supra*, 496 U.S. at 380-81.

B. *The Federal Tax Injunction Act Does Not Permit States To Discriminate Against Claims Under 42 U.S.C. § 1983.*

The court below seeks to justify its discriminatory treatment of federal claims by reasoning that the Tax Injunction Act, 28 U.S.C. § 1341 (1988), either directly or by implication, permits state courts to discriminate against § 1983 tax claims. There is no legitimate authority for this position.

First, the Tax Injunction Act, by its very terms, places limits on the ability of federal courts — not state courts — to hear cases involving challenges to state taxation, whether such challenges arise under § 1983 or otherwise. The purpose of this statute is to allow state courts to adjudicate such controversies to the fullest extent possible; it was never intended to limit the availability of federal claims in state court. *See, e.g.*,

Rosewell v. *LaSalle National Bank*, 450 U.S. 503, 515 n.19 (1991) (the Tax Injunction Act embodied "Congress' decision to *transfer* jurisdiction" over federal claims from the federal district courts to the state courts) (emphasis added).

There is nothing in the legislative history of the Tax Injunction Act which suggests that it was intended to limit the availability of § 1983 actions in state court.[4] "The text of the Act, which refers only to the federal district courts, makes clear that it is merely a jurisdiction-shifting provision. . . . The legislative history and narrow focus of the Tax Injunction Act also make clear that the Act was not a congressional preemption of the remedies provided by § 1983 in the area of state taxation." Taylor, "Section 1983 in State Court: A Remedy for Unconstitutional State Taxation," 95 Yale L.J. 414, 419 (1985).[5]

The limited effect of the Tax Injunction Act must also be contrasted with the broad scope which Congress intended for § 1983. This Court has "repeatedly held that the coverage of [§ 1983] must be construed broadly," *Golden State Transit Corp.* v. *Los Angeles*, 493 U.S. 103, 105 (1989) (citations omitted), and that "[t]he legislative history of the section also stresses that as a remedial statute, it should be 'liberally and

[4] For example, Senator Bone, the act's primary sponsor, introduced the bill that became the Tax Injunction Act by saying that the "proposed amendment would affect *the jurisdiction of the district courts*," not the state courts. 81 Cong. Rec. 1415 (1937) (emphasis added). The House and Senate reports confirm that the act was not intended to foreclose taxpayer access to rights based upon federal law. *See* H.R. Rep. No. 1503 at 2 ("the bill does not take away any right of the taxpayer or deprive him of his day in court . . .").

[5] It is noteworthy that federal courts will readily hear § 1983 cases involving state taxation where the requirements of the Tax Injunction Act are not satisfied. For example, in *Direct Marketing Association, Inc.* v. *Bennett*, the United States Court of Appeals for the Ninth Circuit reversed a district court decision which dismissed DMA's case on the basis of the Tax Injunction Act. 916 F.2d 1451 (9th Cir. 1990), *cert. denied*, 111 S.Ct. 1683 (1991). The Ninth Circuit ruled that federal court prosecution of a § 1983 tax claim *could* go forward because of uncertainty over whether DMA would be able to assert its claims in state court. 916 F.2d at 1457.

beneficently construed." *Dennis* v. *Higgins*, 498 U.S. 439, 443 (1991) (quoting *Monell* v. *New York City Dep't of Social Services*, 436 U.S. 865, 868 (1978)). The reach of § 1983 is "broad and unqualified." *Dennis* v. *Higgins*, 498 U.S. at 443 n.4.

To allow a jurisdiction-shifting statute like the Tax Injunction Act to eviscerate § 1983 — either directly or indirectly — would unfairly constrict the scope of § 1983, which was intended to be "broadly construed" to provide protection against "all forms of official violation of federally protected rights." *See Dennis* v. *Higgins*, 436 U.S. at 869 (quoting *Monell, supra*, 436 U.S. at 700-01)).

II. The Court Should Intercede to Reconcile Sharply Conflicting State Court Decisions.

Unless this Court summarily reverses the decision below or grants certiorari, tax case litigants, including DMA's members, face a sharp conflict among state courts regarding whether lawsuits challenging state revenue department actions may be maintained under 42 U.S.C. § 1983 — and, *a fortiori*, whether attorney's fees are available to successful state court litigants under § 1988. There simply is no disciplined consensus among the various state courts on this fundamental question of federalism. By granting certiorari, the Court can settle this issue and introduce sorely needed consistency, predictability, and fairness into the handling of federal claims in state tax cases.[6]

Cases starkly at odds with the decision below include: *Bloomingdale's By Mail Ltd.* v. *Huddleston*, 848 S.W.2d 52 (Tenn.

[6] Justice Kennedy astutely observed, in his dissent in *Dennis* v. *Higgins*, that the question of whether state tax claims under § 1983 must be recognized in state court is one of "paramount importance." 498 U.S. at 465. Petition at 11.

1992), *cert. denied*, ___ S.Ct. ___, 66 U.S.L.W. 3850 (June 21, 1993) (awarding attorney's fees under § 1988 in state tax case after ruling that "a state court that has subject matter jurisdiction may not deny a party to such proceeding its federal rights"); *Marx* v. *Truck Renting & Leasing Association*, 520 So.2d 1333, 1346 (Miss. 1987) ("the absence of federal jurisdiction . . . open[s] the door to the state courthouse so that the taxpayer may there assert his § 1983 claim"); *Allison* v. *Board of County Commissioners of Johnson County*, 737 P.2d 6, 11-12 (Kan. 1987) ("Congress' purpose in adopting [§ 1988] was to assure that the opportunity to enforce federal civil rights would be available to all.") *See also Hogan* v. *Musolf*, 471 N.W.2d 216 (Wis. 1991), *cert. denied*, 112 S.Ct. 867 (1992) (holding that state courts "must entertain sec. 1983 claims," but requiring exhaustion of state administrative remedies "before commencing a sec. 1983 claim" in state court); *Nutbrown* v. *Munn*, 811 P.2d 131, 138 (Or. 1991), *cert. denied*, 112 S.Ct. 867 (1992).

Cases which have sided with the Supreme Court of North Dakota, all of which *preceded* this Court's decision in *Howlett* v. *Rose*, include: *Ziska* v. *Water Pollution Control Authority*, 490 A.2d 509 (Conn. 1985); *Stuffelbaum* v. *Panethiere*, 691 S.W.2d 271 (Mo. 1985); *Spencer* v. *South Carolina Tax Comm'n*, 316 S.E.2d 386 (S.C. 1984), *aff'd by an equally divided Court*, 471 U.S. 82 (1985) (per curiam); *Backus* v. *Chivilis*, 224 S.E.2d 370 (Ga. 1976).

Absent resolution of this conflict by either summary reversal or plenary review, the decision below and the Tennessee court's decision in *Bloomingdale's* will stand at opposite ends of a spectrum of decisions that will inevitably develop. Furthermore, if this case is neither reversed nor reviewed, a strong signal will be sent to state courts that they may discriminate against federal causes of action as long as they articulate a state policy for doing so. The Court should not allow such confusion to develop.

III. The Potential For An Award of Attorney's Fees Is Necessary to Ensure That Tax Officials Respect the Constitutional Rights of Small Businesses, Including Direct Marketers.

It is well-settled that the fee award authorized by § 1988 is "an integral part of the remedies necessary to obtain compliance with § 1983." *Maine* v. *Thibotout*, 448 U.S. 11 (1980). The entitlement to a recovery of fees is most acute for the majority of DMA's members, who are relatively small retailers that cannot afford an expensive legal battle with state tax officials in state courts located far from their home offices. The constitutional rights protected by § 1983 should not be limited only to those companies which can afford to wage legal battles with state tax administrators; 42 U.S.C. § 1988 was intended to enable litigants of all kinds to defend their constitutional rights. Unless state courts are instructed that they must afford tax litigants full access to § 1983 actions in state courts, some states will effectively suppress constitutional challenges to their taxation schemes.

In use tax cases such as this — where declaratory or injunctive relief is sought — there is *no* likelihood of monetary recovery. Indeed, the very best that can be accomplished in a state use tax case is a refund of taxes, penalties, and interest which have already been paid. A majority of DMA members, if faced with the option of either collecting the tax or resisting the constitutionally suspect demands of state tax officials, would probably be forced to accede to the state demands because of the expense of litigation and the unavailability of compensatory damages for the high cost of use tax collection and remittance. Recovery of attorney's fees under § 1988 is imperative if such firms are to have any meaningful opportunity to enforce their rights.

The magnitude of the fees expended in the instant case present a stunning illustration of how, if left in place, the

decision below would put litigation beyond the reach of most DMA members. Mail order companies can reasonably expect to incur such substantial costs in every jurisdiction where they elect to resist questionable use tax collection demands. Tax officials are keenly aware of the leverage they possess over small and distant companies if attorney's fees cannot be recovered, as well as the concomitant lack of risk to themselves from making their demands — no matter how unreasonable those demands may be.

CONCLUSION

This case presents an important question of federalism and results in a serious conflict among state courts which warrants the Court's attention. The underlying legal principles as well as the equities of this case support summary reversal or, in the alternative, the granting of Quill's petition. Faced with corporate and perhaps personal liability[7] for uncollected use taxes, the enormous burden of collecting state and local taxes, and the specter of millions of dollars in legal fees incurred in multiple lawsuits across the country, DMA's members, especially those smaller companies which constitute the bulk of its membership, need the § 1988 entitlement to attorney's fees as a means of asserting effectively their constitutional rights and deterring the overreaching enforcement efforts of state tax officials.

[7] Numerous states have statutes which make owners, officers, and managers personally liable for use taxes which their companies fail to collect, and provide for the imposition of criminal penalties in such cases. *See, e.g.*, Ch. 60, Art. 28, New York Tax Law ("NYTL") § 1145(e); Ch. 60, Art. 37, NYTL § 1817(c). Several states have threatened to enforce these statutes against individuals associated with direct marketing companies.

For the reasons stated herein, DMA asks the Court to summarily reverse the decision below or, in the alternative, grant Quill's Petition for Writ of Certiorari.

Respectfully submitted,

GEORGE S. ISAACSON
Counsel of Record

MARTIN I. EISENSTEIN
DAVID W. BERTONI
BRANN & ISAACSON
184 Main Street
P.O. Box 3070
Lewiston, Maine 04243-3070
(207) 786-3566

ROBERT J. LEVERING
Senior Vice President
DIRECT MARKETING ASSOCIATION
Washington, D.C. 20543

Attorneys for Amicus Curiae
Direct Marketing Association